BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Fifth Circuit has not been officially reported. It appears at pages 160-67 of the Record.

Statement of the Case

This has already been stated in the preceding Petition (on pages 2-5) which is here adopted and made a part of this Brief.

Specifications of Error

(These were presented by appropriate assignments of error to the Circuit Court of Appeals—R. 171-73.)

THE CIRCUIT COURT OF APPEALS ERRED:

I.

In not holding that Petitioners were denied the constitutional privilege—the issue having been made by demurrers and motions to quash—of being fully "informed of the nature and cause of the accusations" against them, in violation of amendments Fifth and Sixth, UNITED STATES CONSTITUTION.

II.

In not holding that this indictment attempting to charge the offense of robbery, only in the words of the statute (Sec. 99, Title 18, U. S. C. A.)—the statute as well as the indictment failing to state the essential ingredients of which the

crime is composed—was insufficient as against valid demurrers and motions to quash.

III.

In not holding that since the statute (Sec. 99, Title 18, U. S. C. A.), is couched in general terms and does not define all the essential elements to constitute the offense, it is necessary that an indictment brought under this statute descend to particulars and allege the essential ingredients of which the crime is composed.

IV.

In not holding that since Petitioners' demurrers and motions to quash were directed to the failure of the pleader to set forth, in Count 1, all the elements necessary to constitute the offense intended to be charged, particularly, since Section 99, Title 18, U. S. C. A., does not define all the essential elements necessary to constitute the offense and does not fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense to be punished, these convictions could not be sustained.

V.

In holding that although the indictment did not contain the essential elements to constitute the offense, a bill of particulars would revitalize a fundamentally defective indictment, and supply the necessary omissions.

VI.

In not holding that a fatal variance existed in this case—the allegations in the first count stated that the commission of the crime took place in Ft. Bend County, Texas, whereas,

the evidence indisputably showed that the offense took place in Brazoria County, Texas—and that these convictions should not be sustained.

VII.

In not holding that the evidence did not demonstrate, beyond a reasonable doubt, petitioners' "guilt" under the first count of the indictment, particularly since the evidence indisputably shows:

(a) That Petitioners did not intend to appropriate said automobile to their own use and benefit other than to ride in it and thereafter abandoned it,

(b) The Petitioners took the automobile with no intention of stealing the same, but only intended to use it for a mere temporary purpose,

(c) That the automobile was never out of the possession of the Game Warden, at any time, and was ultimately turned over to him by these Petitioners, undamaged and unharmed.

VIII.

In not holding that these convictions were not sustained by competent and relevant proof beyond a reasonable doubt.

IX.

In not holding that these convictions were not sustained by sufficient evidence and that such convictions are contrary to law.

Summary of Argument

1) ***Vague and Insufficient Indictment***

The indictment is void for uncertainty, and it charges

no offense under the Federal laws or under the Common law. It fails to inform Petitioners "of the nature and cause of the accusation" against them (CONST., Art. VI) or to sufficiently define the charge so as to enable Petitioners subsequently to avail themselves, upon a further prosecution for the same cause, of their right to immunity from double jeopardy (CONST., Art. V). Moreover, the indictment fails utterly to allege the offense —the crime being related to the *Common law only*—so as to bring it within the description as given in the *Common law*, and fails further to allege *any* of the essential ingredients composing the crime. Therefore, the *demurrer* should have been sustained, since the charge is wholly without authority of law.

2) ***Material and Fatal Variance Between Allegation and Proofs***

No evidence was offered by Petitioners. The Government specifically alleged that the offense occurred in *Fort Bend County*, Texas, whereas, the proofs show indisputably that it took place in *Brazoria County, Texas.* Such allegation being a matter of substance, as well as proof, the Government was required to establish same by competent evidence. Inasmuch as the allegation conflicts materially with the proofs, the Motion for Direction, on this score, should have been granted.

3) ***Proof Is Insufficient***

The evidence in the record shows clearly *no* intent existed on part of Petitioners to commit the alleged crime, the absence of which leaves no room for doubt that the convictions were *not sustained.*

4) ***Convictions Not Sustained by Competent Proof Beyond a Reasonable Doubt***

There was a complete failure of affirmative proof to show any inference of guilt. All of the evidence—offered by the Government *only*—reveals clearly that instead of Petitioners having committed the crime charged, succeeded merely in getting a forced hitch-hike from Manvel, Texas, to Houston, Texas, and that there never existed any *intent* to commit the offense. That being so, the convictions are not justified since the proof did not exclude every reasonable hypothesis of innocence.

5) ***Utter Lack of Evidence***

The evidence in the record fails utterly to show any *intent* on the part of Petitioners to appropriate the automobile. All of the proof shows affirmatively that it was not only taken with the intent to use it *temporarily*, but that it was, as a fact, *temporarily* used. The Game Warden remained in the car continuously, and the car was, by these Petitioners, left with the Game Warden in it, *undamaged* and *unharmed*. At most, the evidence established a forcible trespass, or, *temporary* use of another's property. No shred of evidence indicates "guilt" by Petitioners. There is *not* even a showing that Petitioners intended to appropriate said automobile, or that they did, in fact, appropriate the same. The persons who actually drove the automobile, although indicted with Petitioners, *have never been tried*. The record wholly fails to sustain the convictions.

Argument

I.

The alleged indictment is fatally defective in failing to inform petitioners of the charge against them and in failing to charge the essential elements of the offense constituting robbery.

By Demurrer and Motion to Quash, Petitioners asserted in the Trial Court that the indictment was so vague and indefinite as to fail to inform them of the charge against them, making it insufficient in law (R. 6-9). These were overruled (R. 10).

The pertinent portions of the charging part, alleged (R. 4):

> "did rob one Frank Clarkson of an automobile, said automobile being then and there a Chevrolet Sedan bearing Texas License No. Y-11-469, belonging to the United States; ".

The foregoing count was based upon that portion of Sec. 99, Title 18, U. S. C. A., which reads:

> "Whoever shall rob another of any kind or description of personal property belonging to the United States, * * * shall be fined not more than $5,000, or imprisoned not more than ten years, or both."

Casual reading of this charge shows that aside from charging the offense substantially in the words of the quoted Statute, it does no more than allege the naked conclusion that Petitioners "did rob" an automobile. Obviously, the allegation is too general, and is so vague as to be inadequate to inform Petitioners of the charge against them. Particularly, it

is insufficient to enable them to enjoy their right subsequently to avail themselves of the right against double jeopardy in case of a further prosecution for the same cause (U. S. v. CRUIKSHANK, 92 U.S. 542).

Though the offense is stated substantially in the language of the Statute, it is insufficient because it does not apprise Petitioners of the nature of the accusation, and fails to set forth the essential elements necessary to constitute the crime intended to be punished. This is made crystal clear when tested by the pronouncements laid down in U. S. v. CARLL, 105 U.S. 611, 612; U. S. v. HESS, 124 U.S. 483; EVANS v. U. S., 153 U.S. 584, and MOORE v. U. S., 160 U.S. 268. As stated in U. S. v. HESS, 124 U.S. 483, 486:

> "The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury."

The legislative history of this statute shows clearly that no attempt was made to expand further the well-understood meaning of the generic term "rob" at Common law. Since the Statute upon which this indictment is founded fails to particularize the meaning, as well as the ingredients of the offense, the Government should have restored to the Common law for the purpose of stating in apt and legal language the nature and essence of the offense (KECK v. U. S., 172 U.S. 434; U. S. v. STAATS, 49 U.S. 41).

The necessary elements to constitute a valid indictment *under this Statute* have been pointed out quite clearly in several Opinions embracing this particular crime. In JOLLY v. U. S., 170 U.S. 402, it is stated:

"There are two distinct offenses mentioned in the Statute:

"One is the offense of robbery, the legal and technical meaning of which is well known. *It is a forcible taking or a taking by putting the individual robbed in fear.*"

In HUDSPETH v. DUFFY (10 Cir.), 112 Fed. (2d) 559, 560, it was expressly held: *"Taking by means of force or intimidation is an element of the first (Robbery) offense."* RUTKOWSKI v. U. S. (6 Cir.), 149 Fed. (2d) 481, cites with approval the opinion in LAMORE v. U. S. (D.C.), 136 Fed. (2d) 766, wherein robbery is regarded as a felony at Common law, and quotes the following language as bearing upon the essentials of a valid indictment for robbery (footnote 3):

"Robbery, by the common law, is larceny from the person, accompanied by violence or by putting in fear; *and an indictment therefor must allege that the taking was from the person, and that it was by violence or by putting in fear, in addition to the averments for other larcenies;* * * * " (Emphasis supplied.)

Although the indictment in the instant case fails to measure up to the standards of the cases last cited; did not set out any of the essential requisites to state a legal offense, and its validity was timely and properly challenged (R. 6-9), the court below held that a Bill of Particulars would have supplied the material omissions, and that "Webster's International Dictionary" is incorporated, by reference, in this indictment.

The opinion of the Court below relies principally upon the cases of VANE v. U. S. (Idaho District Court), 254 Fed. 32; HEWITT v. U. S. (8 Cir.), 110 Fed. (2d) 1; and WISEMAN v. U. S. (8 Cir.), 1 Fed. (2d) 696, as being conclusive of the issue that the indictment, in the instant case, is good

as against Demurrers and Motions to Quash. Analysis of the cases shows conclusively that in all said cases the indictments contained the essential elements of the offense. For example in the VANE case, supra, the charge was that Vane * * * "willfully, unlawfully and feloniously, did rob the said De-Wirtz of certain mail matter; that is to say, they * * * then and there willfully, unlawfully and feloniously, as aforesaid, and *by force and violence* * * * ." This charge was good because it contained the main ingredient of robbery to-wit: *"and by force and violence,"* and principally because *no demurrer* was filed challenging the indictment. In the HEWITT case, supra, no point was raised as to the indictment *not* containing the essential elements of the offense. The sole point, relevant to the issue in the instant case, raised in the HEWITT case was that designating "Federal Deposit Insurance Corporation" by its initials 'F.D.I.C," rendered the indictment defective. With that decision we have no quarrel. It is sound law. In the WISEMAN case, supra, the point there was that the indictment should have used the words "from the person," instead of "against the person." Obviously, this was an error of diction, and the Court properly ruled the indictment good in that case.

In the instant case, the indictment contained none of the essential ingredients composing this crime, and the Court's attention was called specifically to this fact by Demurrers and Motions to Quash. As to the lower Court's opinion, in these respects, it is at wide variance with previous decisions of the same Court, notably, GLOVER v. U. S., 125 Fed. (2d) 291; GRIMSLEY v. U. S., 50 Fed. (2d) 509; BOYKIN v. U. S., 11 Fed. (2d) 484, and HAMNER v. U. S., 134 Fed. (2d) 592.

The lower court, in attempting to further dispose of the real issues in this case, cites TUBBS v. U. S. (8 Cir.), 105 Fed. 59, which embraces an indictment for mailing an obscene, lewd, and lascivious letter through the United States

mails. Perusal of that decision shows plainly that the indictment set forth the ingredients of the offense. Moreover, *no demurrer was filed in that case*. It is fundamental that where an indictment is bad on demurrer, as is the case here, it cannot be cured by a Bill of Particulars.

The record shows, we submit, that both the Trial Court and the Court below brushed aside petitioners' challenge to the indictment, swept Constitutional rights under the bed, and forgot to remember the classic admonition of MR. JUSTICE MURPHY in GLASSER v. U. S., 315 U.S. 457, 463-464:

> "* * * In all cases the Constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be ground for reversal, cannot be brushed aside as immaterial since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt. * * *"

There are no Common law crimes against the United States (U. S. v. EATON, 144 U.S. 627). And, as stated by MR. JUSTICE FRANKFURTER in SINGER v. U. S., 323 U.S. 338, 350:

> "For more than half a century, ever since United States v. Eaton, 144 U.S. 677, 12 S. Ct. 764, 36 L. Ed. 591, it has been the settled principle of Federal criminal law that a provision merely punishing violation of a 'law' does not cover violations of rules or regulations made in conformity with that law * * * United States v. Eaton is not a Judicial sport."

Thus, Congress having failed to define the Crime here charged, the pleader should have resorted to the Common law

and particularized the manner and means employed in committing the offense (KECK v. U. S., 172 U.S. 434).

Admittedly, a Bill of Particulars can never supply material omissions, nor revitalize a defective indictment, as is the case here. EX PARTE BAIN, 121 U.S. 1; U. S. v. NORRIS, 281 U.S. 619, and JARL v. U. S. (8 Cir.), 19 Fed. (2d) 891.

The facts alleged and not the Statute cited by the pleader determine the legal force of the averments. WILLIAMS v. U. S., 168 U.S. 382, 389; OUTLAW v. U. S. (5 Cir.), 81 Fed. (2d) 805, 806.

Any law or rule of law established by the Courts which authorizes, or pretends to authorize, an indictment such as is present in this case should be held to be unconstitutional, null and void for the reasons herein assigned.

It is submitted that this indictment is void.

II.

There was a fatal variance between the allegation and proofs established.

The only evidence offered in this cause was that presented by the Government. Witnesses Clarkson and Miller both testified categorically that the alleged offense took place near Manvel, *Brazoria County, Texas* (R. 37-38, 104).

The indictment alleged specifically that the crime was committed in Fort Bend County, Texas (R. 4-5).

The variance thus shown is material, because the specific allegation as to the place of commission is a matter of substance as well as proof, which the Government was required to establish by relevant evidence (BURTON v. U. S., 196 U.S. 283; ANDERSON v. U. S. (5 Cir.), 30 Fed. (2d) 485).

In their Motion for Directed Verdict (R. 144-147) Petitioners pointed out this variance. Later, in their Motion for

New Trial, they appropriately preserved this point (R. 21). Obviously, no narrow, technical, question is thus presented.

The evidence fails utterly to show that there was an intent to permanently appropriate the property alleged to have been taken.

There was no evidence of any kind that Petitioners took Clarkson's (Game Warden) car as a permanent appropriation. All the evidence shows that they secured a ride in said car, that they were in it *only* two hours (R. 46, 56), that neither of them actually possessed the car as a driver (R. 44), and when they got out of the car and left it, at Houston, Texas, Clarkson was still in the car (R. 56, 102-103).

When petitioners (with two defendants who never have been tried) reached Manvel (Brazoria County), Texas, Clarkson's car was parked on an open road, he had it there an hour (R. 63), and the reason he gave for having it there was rather flimsy (R. 64). Clarkson had more guns and ammunition in the car than there was any obvious reason for his having, and one of his guns was a high-powered rifle (R. 164-65). He was not accustomed to carrying this rifle, but happened to have it that day (R.65).When petitioner Norris, who was unarmed, and never showed any weapon (R. 38), came up to Clarkson's car, he (Clarkson) had the high-powered rifle on the floor of the back seat (R. 72); he had a .45 pistol sticking in the armrest of the front door, on the left side (which he was facing) so that he could easily have reached across, and got it, and he had a .22 rifle on the front seat, right side (R. 72).

Clarkson is an officer who habitually deals with lawbreakers, and should have been able to handle the situation; he is a sturdy man who was in the last war (wounded), who is an excellent shot (R. 64), and who must be considered

courageous to have been kept in the Warden's service since 1926 (R. 47, 49)—yet Clarkson put up his hands at Norris' command (R. 38), and let the other men jerk him around, according to his own testimony.

Why did Clarkson fail to draw upon his expert skill as a marksman, with rifles, pistols and ammunition within easy reach and attempt to frustrate their entry?

There was no evidence of any kind to show complicity between Petitioners and the two defendants indicted with Petitioners, *but not yet tried*. The proof establishes abundantly that petitioners were *not* aware that the other defendants (Gaddy and Britton) intended to take the vehicle from the Game Warden.

These convictions rested entirely on circumstantial evidence. The circumstantial evidence makes it probable that Petitioners did not actually use force or intimidation in securing a ride from the Game Warden. The Game Warden and witness Miller were unharmed (R. 75), and the evidence is that the home-made shotgun could not be fired without considerable adjustments being made.

A fair and impartial review of all the evidence demonstrates that the Government failed to prove any of the conditions necessary for a robbery conviction. For, as stated in DUFFY v. HUDSPETH, 112 Fed. (2d) 559-560: "The robbery is complete when the goods are taken *from the person* of another and *held by the robber* for a perceptible interval of time."

Here, the affirmative evidence shows that Petitioners rode in the car, *with the Game Warden in it all the time* (R. 56-102-103), and that Petitioners were not in the car longer than 2½ hours and when they reached Houston, Texas, they got out of the car and never returned to it.

Petitioners offered no evidence. They took the position by

Motion for Direction (R. 144), and, later in their Motion for new trial (R. 19), that the evidence was insufficient, as a matter of law, to show the presence of the requisite factors and the specific intent to "rob."

They contended further that there was a complete failure of affirmative proof to show any inference of guilt—that the Government's evidence belied guilt—and that all of the evidence clearly revealed that instead of Petitioners having "robbed" an automobile, they succeeded in securing a forced hitch-hike from Manvel (Brazoria County), Texas, to Houston, Texas, and that there never existed any intent to "rob" Clarkson's car.

The evidence was unconflicting—and was all offered by the Government. The circumstances are thus robbed of all probative value, since they are consistent with innocence (TINGLE v. U. S. (8 Cir.), 38 Fed. (2d) 573, 574).

It is submitted that the facts in this case are similar to U. S. v. TRINDER, ET AL., 1 Fed. Supp. 659. There, as here, the facts disclose that there was no robbery but a mere trespass; secret borrowing. JUDGE BOURQUIN said at pp. 659-660:

> "Upon principle and authority there was no stealing but merely trespass; secret borrowing. At common law and likewise by Federal statute (18 U.S.C.A., §82) adopting common law terms, stealing in general imports larceny; that is, felonious taking and intent to permanently deprive the owner of his property.
>
> "That intent is absent here, and defendants are not guilty as charged."

The substance of the testimony, therefore, is that conviction is based upon the bare fact that Petitioners drove directly to the place where Clarkson's car was parked on the open highway, and forced a ride in Clarkson's car—and

nothing further. All of the evidence, as to guilt, raised nothing more than mere suspicion and mere conjecture.

In considering this point, the Court below practically ignored this issue. It is our contention that the testimony must be considered as a whole and that so considered it lacks the degree of proof essential in a criminal case. No proper inference of guilt is, therefore, permissible.

Conclusion

For the reasons before stated, Petitioners earnestly urge that this Court grant its Writ of Certiorari directed to the Circuit Court of Appeals for the Fifth Circuit and relieve these Petitioners from the unjust burden to which they are subjected by the terms of the Judgment entered against them by said Court.

Respectfully submitted,

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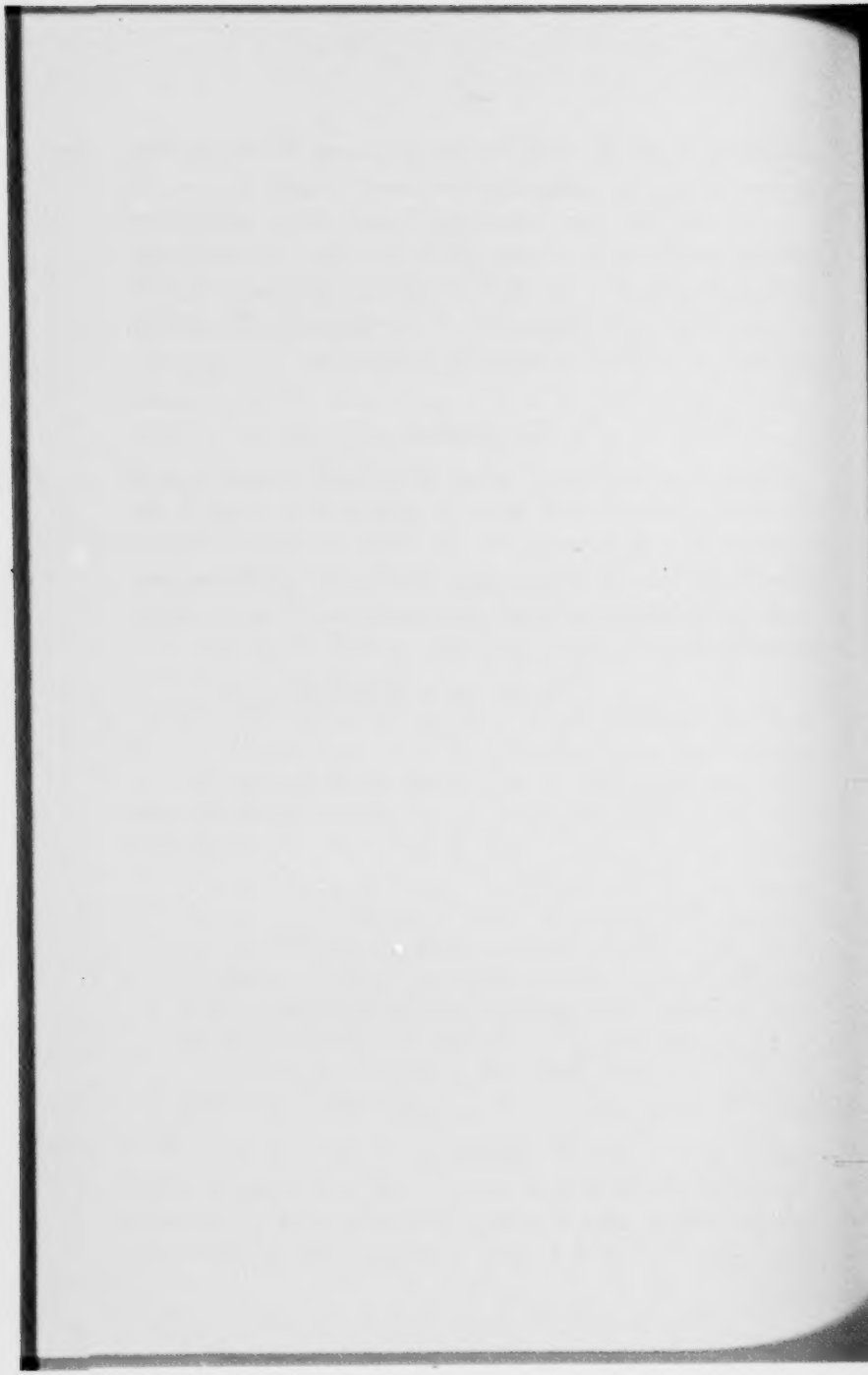


11

No. 957

In the Supreme Court of the United States

OCTOBER TERM, 1945

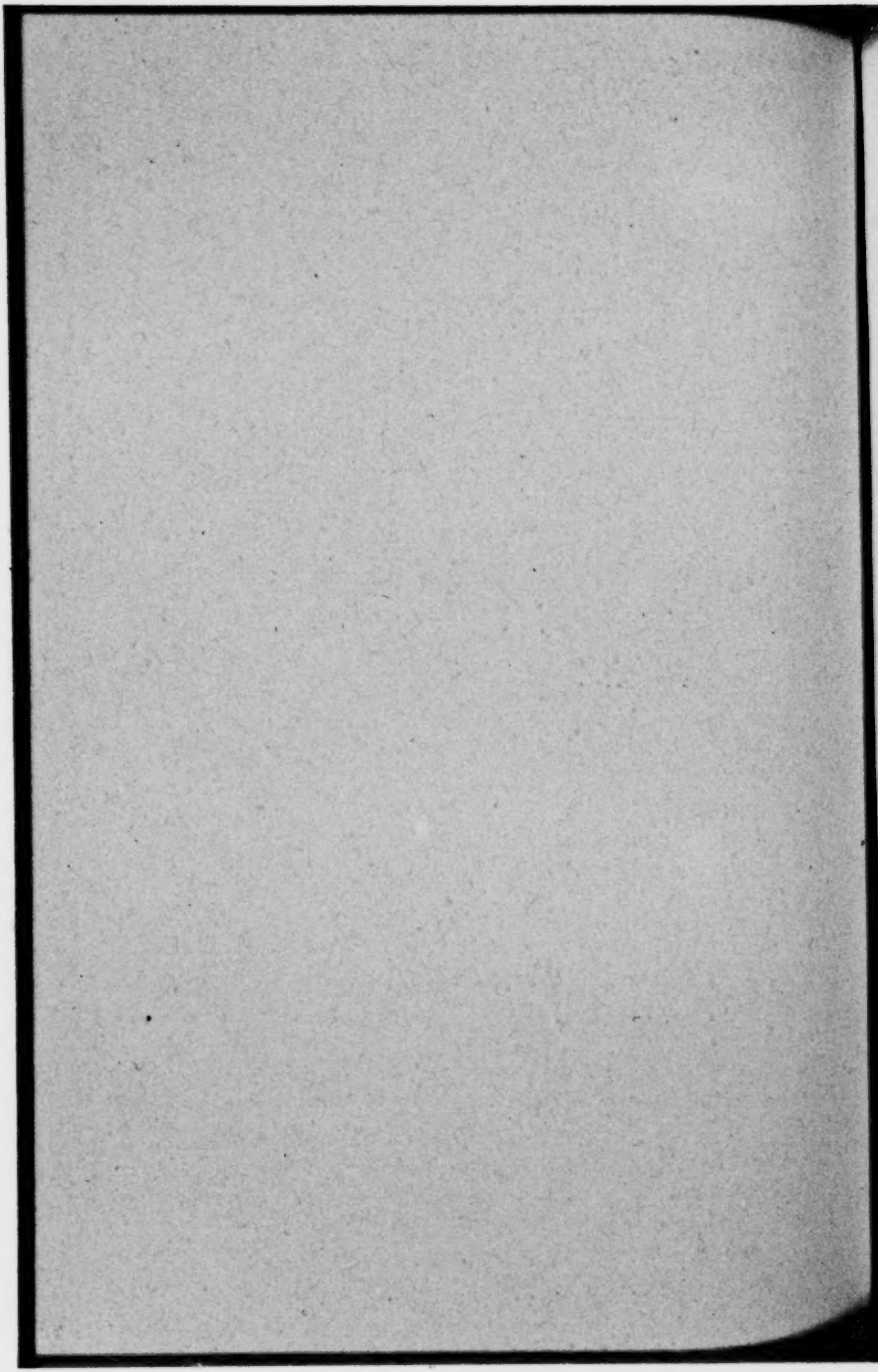
THOMAS NATHAN NORRIS AND JOHN FREDERICK BOX, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI



INDEX

CITATIONS

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OPINION BELOW

The opinion of the circuit court of appeals (R. 160–166) is reported at 152 F. 2d 808.

JURISDICTION

The judgment of the circuit court of appeals was entered on January 15, 1946 (R. 167), and

a petition for rehearing was denied on February 9, 1946 (R. 174). The petition for a writ of certiorari was filed March 15, 1946. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether the indictment, which charged that petitioners robbed a named individual of an automobile belonging to the United States, was fatally defective in failing to specify that the taking was by violence or putting in fear.

2. Whether the variance between the indictment and the proof as to the county in which the offense occurred was material.

3. Whether the jury was warranted in finding that the taking was with intent permanently to deprive the owner of posession of the automobile.

STATUTE INVOLVED

Section 46 of the Criminal Code, 18 U. S. C. 99, provides:

> Whoever shall rob another of any kind or description of personal property belonging to the United States, or shall feloniously take and carry away the same, shall be fined not more than $5,000, or imprisoned not more than ten years, or both.

STATEMENT

An indictment was returned against petitioners and two others in the United States District Court for the Southern District of Texas, charging a violation of Section 46 of the Criminal Code (18 U. S. C. 99), in that, in Fort Bend County, Texas, they "did rob one Frank Clarkson of an automobile, said automobile being then and there a Chevrolet Sedan, bearing Texas license No. Y11–469, belonging to the United States" (R. 4–5). A demurrer to the indictment and a motion to quash on the grounds that it failed to allege facts sufficient to constitute an offense and failed to describe the alleged robbery with sufficient definiteness to enable petitioners to prepare their defense, were overruled (R. 6–12). Petitioners were convicted, and each was sentenced to imprisonment for 10 years and to pay a fine of $1,000 (R. 14–15, 17–18).[1] On appeal, the judgments of the district court were affirmed (R. 167).

The evidence for the Government may be summarized as follows:

On February 27, 1945, Frank Clarkson, a federal game warden, had a government car parked near Manvel, Texas, in Brazoria County (R. 37–38, 63). He was in the back of the car, between the seats, when a Ford V–8 drove up nearby

[1] The jury acquitted petitioners on the second count charging interference with a federal officer in the performance of his duties (R. 5, 14).

(R. 38). Petitioner Norris walked over to Clarkson's car, opened the door and entered it. He told Clarkson to put up his hands, stating that it was a "stick up." (R. 38.) Two other men (Gaddy and Britton, named as defendants but not tried with petitioners (R. 41)), opened the back door of the car and pushed Clarkson out (R. 39). Petitioner Box covered Clarkson with a crude shotgun made out of a gas pipe (R. 39). The men searched Clarkson's person and the car, taking several guns which he had therein (R. 40).

The Ford in which the four men had driven up was owned by one Miller, who had been stopped by petitioners and the others and forced to accompany them (R. 95). The four men ordered Clarkson and Miller into the government car (R. 42, 99). Gaddy drove this car off in the direction of Houston, Texas, with petitioners in the front seat and Britton in the back guarding Clarkson and Miller (R. 43–44, 101). In response to a question by petitioner Box, Clarkson told him that the car was owned by the Government (R. 61, 104). When the car reached Houston, petitioner Norris made a telephone call. About twenty minutes later another car arrived in which petitioners departed (R. 56, 102.) Gaddy and Britton drove off with Clarkson and Miller and dropped them in the woods about six miles from the town of Romayor (R. 57–58, 103). Gaddy and Britton were apprehended by Texas

State Police some hours later, driving the government car toward Louisiana (R. 138–139, 141–142).

ARGUMENT

1. Petitioners contend (Pet. 3, 4, 6, 9–10, 11–12, 14–19) that the indictment is fatally defective in charging that petitioners "did rob" Clarkson of a government owned automobile without specifying that the taking was accompanied by violence or putting in fear. However, as the court below pointed out (R. 163–164), the word "rob" is one of well defined meaning, which in itself carries the connotation of violence and fear. See *Deal* v. *United States,* 274 U. S. 277, 283; *Collins* v. *McDonald,* 258 U. S. 416, 420; *Jolly* v. *United States,* 170 U. S. 402, 404. The word "rob" was therefore sufficient to charge these elements of the offense. Cf. *Steffler* v. *United States,* 143 F. 2d 772 (C. C. A. 7), certiorari denied, 323 U. S. 746, in which an indictment charging entry into a federally insured bank with intent to commit larceny was held sufficient although the elements of larceny were not set forth.

The indictment specified the date of the offense, the person robbed, the property taken, and its ownership by the United States. It thus was sufficient to meet the tests by which its validity must be judged; it informed petitioners of the nature of the offense and barred future prosecu-

tion on the same charge. *Glasser* v. *United States,* 315 U. S. 60, 66; *Hagner* v. *United States,* 285 U. S. 427, 431.

2. The indictment charged that the offense was committed in Fort Bend County, Texas (R. 4). The proof established that at the time of the taking the car was in Brazoria County, Texas (R. 38), near the line dividing the two counties (R. 165). There is no merit in petitioners' claim that this was a material variance (Pet. 4, 10–11, 19–20). Both counties are within the jurisdiction of the district court in which the case was tried, and in the Galveston division of that district. Section 108 of the Judicial Code (28 U. S. C. 189). Location is not an element of the offense with which petitioners were charged and there is no showing that the variance affected petitioners' substantial rights. *Mehan* v. *United States,* 112 F. 2d 561, 563 (C. C. A. 8); *Day* v. *United States,* 28 F. 2d 586 (C. C. A. 8), certiorari denied, 278 U. S. 651; *McDonough* v. *United States,* 299 Fed. 30, 40–42 (C. C. A. 9), certiorari denied, 266 U. S. 613; see also *Berger* v. *United States,* 295 U. S. 78, 83.

3. Petitioners challenge the sufficiency of the evidence (Pet. 4–5, 11, 12–13, 20–23) as failing to establish their intent permanently to deprive Clarkson of possession of the automobile. They argue that, since they left the car while Clarkson was still in it, the evidence shows merely an intent to force a ride in the car. However, it

appears from the testimony that all four defendants were using the car as a means of escape and that they took the government car when they found that Miller's was too slow for their purposes (R. 96–98). Petitioners' confederates retained possession of the car after they dropped Miller and Clarkson, showing clearly that there was no intention to return the car. The jury was therefore justified in finding, as the trial judge instructed them they were required to find in order to convict, that petitioners intended to deprive the custodian of the car "wholly and permanently" of its possession (R. 153½; see also R. 150).

CONCLUSION

The decision below is correct and the case presents no conflict of decision or question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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MAY 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946